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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. ALEX JOSE NIETO, Defendant and Appellant.	C049170 (Super. Ct. No. P04CRF0280)

Charged with committing multiple sex acts with children, defendant Alex Jose Nieto entered a negotiated plea of guilty to two counts of lewd and lascivious acts upon children under 14 years of age (Pen. Code, § 288, subd. (a)), and the remaining charges were dismissed. (Further section references are to the Penal Code unless otherwise specified.) Defendant's request for probation was denied, and he was sentenced to state prison for an aggregate term of eight years.

On appeal, defendant contends (1) he is entitled to resentencing because the trial court erroneously relied on California Rule of Court, rule 4.413(b) to deny probation (further references to rules are to the California Rules of Court); (2) the decision to deny probation was not supported by substantial evidence; and (3) the court erred at the sentencing hearing by allowing an expert's report regarding defendant's mental condition to be introduced into evidence even though the expert did not testify and, therefore, was not available for cross-examination. We shall affirm the judgment.

FACTS

Between January 1, 1998, and May 12, 2001, defendant molested two children under 14 years of age. He sexually abused the older victim approximately six to eight times, beginning when she was 11 or 12 years old; a typical incident involved defendant touching the victim's vagina and breasts under her clothing and placing her hand on his erect penis. The younger victim reported one sexual assault, which occurred when she was 11 years old; defendant lay down next to her and inserted his finger into her vagina multiple times over the course of two hours. After the younger victim reported the molestation to her mother, defendant apologized to the younger victim. He said "it would never happen again and told her not to tell anyone because he would go to jail and she would never see him again."

When, over a year later, she learned defendant was molesting the older victim, the younger victim reported the molestations to law enforcement. During a routine counseling session about a week

later, defendant admitted to his psychologist, Dr. G. Bruce Quinn, that defendant had engaged in the sexually abusive conduct. Quinn notified authorities, and defendant was arrested.

Defendant was convicted of a lewd and lascivious act with one victim under 14 years of age, committed between January 1, 1998, and May 12, 2001. He also was convicted of a lewd and lascivious act with another victim under 14 years of age, committed between March 1, 2000, and September 1, 2000.

SENTENCING

The trial court ordered a report of defendant's mental condition (§ 288.1) after defense counsel indicated that defendant would apply for probation.

Dr. Shawn Adair Johnston, a licensed psychologist, examined defendant and reported that defendant's prognosis for treatment was "generally favorable"; his behavior met the diagnostic criteria for pedophilia; "he is predisposed to the commission of sexual offenses against children"; "his risk of recidivism is in the moderate range"; the victims "do not believe at this time that [his] imprisonment would be contrary to their best interests"; "it [is] impossible to affirmatively assert that he would not pose a significant or undue future threat" to "the health and safety of the community if granted probation"; and defendant "is an extremely psychologically damaged man whose overall prognosis could be described as no better than guarded."

Appended to the probation report was a letter Dr. Quinn wrote to the probation officer. After summarizing his experience with molesters and victims, and his treatment of defendant, Dr. Quinn

concluded that defendant was neither a predator, flight risk, nor threat to the community at large. Opining that defendant was sincerely remorseful and willing to undergo sex offender treatment, Dr. Quinn stated: "All clinical evidence considered, I feel that long-term sex offender treatment is necessary i[n] his case to prevent re-offending and see him as a candidate for such treatment."

At the sentencing hearing, Dr. Quinn testified he agreed with Dr. Johnston that defendant was not a predatory pedophile, i.e., "an adult male who preys on children, usually little boys, outside of his own family system." When asked whether defendant was amenable to treatment, Dr. Quinn responded: "[H]e is amenable to treatment. I stated that in my report. I believe that will be not only necessary for him in terms of reducing recidivism, because I think again Dr. Johnston was hedging his opinion about recidivism in that it was, you know, it was like on the fence. And [Dr. Johnston] said there was maybe a moderate risk of recidivism, but I believe from what I have seen from [defendant] that he is very amenable to treatment and he would have, as the men did in the program I was involved in before and in my own clinical practice, when confronted with the truth and made to deal with it over time, that growth and understanding insight that is necessary to reduce recidivism comes. It comes in time, but it comes with treatment. It doesn't come by sitting in a cell."

On cross-examination, Dr. Quinn acknowledged that (1) defendant had seen him eight or nine times before revealing his sexual abuse; (2) defendant was "opportunistic," "controlling" and "manipulative," had taken "advantage of the weak" and "vulnerable," and would pose

a danger to the victims without treatment; (3) Dr. Quinn did not conduct any of the clinical tests which Dr. Johnston administered on defendant; and (4) Dr. Quinn had not contacted the victims or reviewed their videotaped interviews.

The two victims expressed in writing the negative consequences that defendant's conduct had on their lives, and their mutual fear of defendant. The older victim said that defendant "should be put away" and that she did not "want to deal with him to any extent." The younger victim wrote: "I want him to be in jail. I want to not have to see or talk with him."

Citing rule 4.413(b), the trial court stated that in order to grant probation, it would have to find defendant's case was unusual.[1] The court declined to make such a finding because there were two victims.

Turning to rule 4.414, criteria affecting probation, the court found that the victims were vulnerable (rule 4.414(a)(3)); defendant inflicted emotional injury on them (rule 4.414(a)(4)); he was an active participant in the crimes (rule 4.414(a)(6)); and he would pose a risk to the public if released on probation (rule 4.414(b)(8)). The court noted that the criteria favoring probation included defendant's lack of criminal sophistication or professionalism (rule 4.414(a)(8)); his lack of a criminal history (rule 4.414(b)(1)); his willingness to participate in

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[1] Rule 4.413(b) applies to a "defendant [who] comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision."

treatment and comply with terms of probation (rule 4.414(b)(3)); and his expression of remorse (rule 4.414(b)(7)).

"[C]onsidering all of the circumstances," the trial court concluded "this is a state prison case" and imposed the middle term of six years for one Penal Code section 288, subdivision (a) conviction, plus a consecutive term of two years (one-third of the middle term) for the other such conviction. Defendant made no objection to the court's reliance on rule 4.413(b).

DISCUSSION

I

Defendant first contends the trial court erred by applying rule 4.413(b) to his application for probation. Rule 4.413(b) states: "If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision, the court should apply the criteria in subdivision (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation."

When defendant committed his crimes between January 1, 1998, and May 12, 2001, section 1203.066, subdivision (a) stated in part: "Notwithstanding Section 1203 or any other law, probation shall not be granted to . . . any of the following persons: [¶] . . . [¶] (7) A person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim. . . ." (Stats. 1997, ch. 817, § 13.) However, subdivision (a)(7) did not apply if the trial court made "all of the following findings:

[¶] (1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household. [¶] (2) A grant of probation to the defendant is in the best interest of the child. [¶] (3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation . . . [¶] (4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. . . . [¶] (5) There is no threat of physical harm to the child victim if probation is granted. . . ." (Former § 1203.066, subd. (c); Stats. 1997, ch. 817, § 13.)[2]

As defendant properly points out, former section 1203.066 "neither uses the triggering phrase stated in rule 4.413(b) [prohibiting probation except in unusual cases where the interests of justice would best be served] nor any substantially equivalent language. . . . Hence, . . . it was error to apply rule 4.413." However, because defendant failed to raise the point in the trial

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[2] By alleging two separate counts of violating section 288, subdivision (a) against two separate victims, the complaint satisfied the statutory requirement that the "existence of any fact that would make a person ineligible for probation under [former section 1203.066,] subdivision (a) shall be alleged in the accusatory pleading" (former § 1203.066, subd. (d); Stats. 1997, ch. 817, § 13); and defendant's plea of guilty to those counts satisfied the statutory requirement that the facts making him ineligible for probation shall be "admitted by the defendant in open court or found to be true by the jury . . . or . . . by the court sitting without a jury." (*Ibid*.)

court, he is barred from raising it on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)[3]

In any event, the error was harmless for two separate reasons.

Despite finding that defendant was ineligible for probation, the trial court went on to "consider the appropriateness of . . . probation" based upon rule 4.414 (criteria affecting the decision to grant or deny probation). Weighing factors applicable to defendant (rule 4.414(a)(3) [the victims were vulnerable]; rule 4.414(a)(4) [defendant inflicted physical or emotional injury on the victims]; rule 4.414(a)(6) [he was an active participant in the crimes]; rule 4.414(a)(8) [the crime lacked sophistication and professionalism]; rule 4.414(b)(1) [defendant had no prior criminal history]; rule 4.414(b)(3) [he was willing to comply with terms of probation]; rule 4.414(b)(7) [defendant was remorseful]; and rule 4.414(b)(8) [he would be a danger to others if not imprisoned]), the court concluded that "this is a state prison case . . . ."

Substantial evidence supports the trial court's assessment of those factors. For example, when confronted after the younger victim told her mother about being molested, defendant promised that it would "never happen again"; nevertheless, he continued to molest the other victim for more than a year. This evidence

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[3] The People suggest that section 1203.065, subdivision (b) applied. Not so. That statute, which states that probation should not be granted to persons convicted of specified crimes "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation" does not list section 288, subdivision (a) as one of the crimes to which the statute applies.

alone is sufficient to support a finding that he would be a danger to children if he were not imprisoned. Indeed, Dr. Johnston opined defendant was such "an extremely psychologically damaged man" that he was "predisposed to the commission of sexual offenses against children" and it was "impossible to affirmatively assert that he would not pose a significant or undue future threat" to "the health and safety of the community if granted probation . . . ."

Therefore, it is readily apparent that even if rule 4.413(b) had not been applied, the trial court would have denied defendant's request for probation based on the court's weighing of the criteria in rule 4.414. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [judgment must be affirmed if it is not reasonably probable that defendant would have obtained a more favorable result absent the error].)

Another reason exists why there is no reasonable probability that defendant would have been granted probation had the trial court not applied rule 4.413(b). Under former section 1203.066, the court was *required to deny probation* unless the court found the existence of *all* of the factors set forth in subdivision (c) of that statute. Among the required findings would be that it was in the victims' best interest to grant probation and that there was no threat of physical harm to either of the victims if probation was granted. The evidence before the court, and the court's rulings in sentencing defendant to state prison, make it plain the court would not have made the aforesaid two findings.

There was no substantial evidence that would have supported a finding that granting defendant probation was in the victims' best interest. Indeed, the victims' letters to the trial court

demonstrated the emotional damage they suffered due to defendant's molestations. One victim recounted how the molestation has made it difficult for her to concentrate, how she remained fearful of defendant, and how she was afraid that defendant "might stop by [her] school" if he were not in prison. The other victim spoke of her "serious depression" and wanted defendant in prison so she would not have to "deal with him to any extent" and because she did not want him around her sister.

There can be no reasonable dispute that placing defendant on probation, rather than committing him to prison, would have exacerbated the victims' emotional trauma and, thus, would not have been in their best interest. The comments of one of the victims made at sentencing illustrated this. "It really sickens me to hear you people stand there and say that you believe [defendant] would not do this again. You don't know what it is like to wake up in the morning and know that it can happen at any time and that there's nothing you can do about it."

And the trial court's finding that it was "not convinced that [defendant] is not a danger if he were not placed in prison" means there is no way the court would have found that defendant posed no threat of physical harm to the victims if probation was granted.

Consequently, we conclude that even if it had not applied rule 4.413(b), the trial court properly would have concluded that defendant was ineligible for probation because the court would

not have found the existence of all of the factors set forth in subdivision (c) of former section 1203.066.[4]

II

Defendant next claims the trial court "failed to properly consider the available evidence, resulting in a lack of substantial evidence to support its decision [to deny probation]." According to defendant, the court "completely disregard[ed] the opinion and testimony of the treating psychologist [Dr. Quinn]." We disagree.

In fact, over the People's objection, the court permitted Dr. Quinn to express his opinion regarding defendant's amenability to treatment. That the court stated it was reserving the question of what weight to be given to Dr. Quinn's opinion does not support defendant's claim that the court "completely ignored the testimony and opinions of Dr. Quinn." To the contrary, it is reasonable to infer the court selected the middle term, rather than the upper term, based in part on Dr. Quinn's opinion testimony.

Citing authorities relating to workers' compensation law, defendant argues that Dr. Quinn's opinion, as defendant's treating

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[4] In passing, defendant argues the trial court's appointment of Dr. Johnston to prepare the section 288.1 report failed to direct him to address each of the criteria set forth in former section 1203.066, subdivision (c), and that the failure to do so "was error under the requirements of Penal Code section 1203.066." The argument fails because it is raised in passing without any legal authority or meaningful argument to support it. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [a point asserted without any argument or authority for the proposition is deemed to be without foundation and requires no discussion by the reviewing court].) In any event, it fails because Johnston's report adequately addressed those criteria.

physician, was entitled to a "rebuttable 'presumption of correctness' . . . ." However, assuming for purpose of discussion that defendant has correctly characterized the workers' compensation laws, they have no application to sentencing in a criminal case.

Ample evidence supports the trial court's denial of probation.

III

Relying on *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (hereafter *Crawford*), defendant claims his "right to confrontation was violated by introduction of the hearsay report of Dr. Johnston who was not shown to be unavailable at sentencing and was never subjected to cross-examination."

The contention fails because "[t]he right to confrontation is basically a trial right." (*Barber v. Page* (1968) 390 U.S. 719, 725 [20 L.Ed.2d 255, 260]; *People v. Miranda* (2000) 23 Cal.4th 340, 349.) California courts "have repeatedly held that the defendant does not have a Sixth Amendment right of confrontation at the sentencing stage of a criminal prosecution. [Citations.]" (*People v. Cain* (2000) 82 Cal.App.4th 81, 86, citing *People v. Arbuckle* (1978) 22 Cal.3d 749, 754, and *People v. Birmingham* (1990) 217 Cal.App.3d 180, 184.) At issue in *Crawford* was the introduction into evidence *at trial* of out-of-court statements that were testimonial in nature. (*Crawford, supra,* 541 U.S. at pp. 40, 68 [158 L.Ed.2d at pp. 185, 203].) Thus, *Crawford* cannot be interpreted to extend the Sixth Amendment right of confrontation to a sentencing proceeding.

Also without merit is defendant's assertion that consideration of Dr. Johnston's report violated defendant's right to due process

of laws. "[T]he federal due process clause does not extend the same evidentiary protections at sentencing proceedings as exist at the trial. A sentencing judge 'may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out-of-court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.' [Citation.]" (*People v. Arbuckle, supra,* 22 Cal.3d at p. 754.) Dr. Johnston's report, prepared pursuant to section 288.1, is such information.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

ROBIE, J.

CANTIL-SAKAUYE, J.